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No. 06-1429

FILED
JUN 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

PETER BURHLRE, Superintendent of Greene Correctional Facility,

Petitioner,

—v.—

SEAN EARLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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June 7, 2007

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

In opposing the petition for a writ of certiorari, Sean Earley ("the defendant") advances a number of meritless contentions, each of which is briefly addressed below.

1. The defendant contends that the petition for a writ of certiorari should be denied because there is no conflict among the federal circuit courts of appeals on the issues presented by the petition. *See* Brief in Opposition ("Br. Opp.") at 6. The defendant is incorrect.

First, the Second Circuit's apparent interpretation of the phrase, "clearly established Federal law, as determined by the Supreme Court of the United States" (*see* 28 U.S.C. § 2254[d][1]), is in conflict with the way that phrase is interpreted by all of the other federal courts of appeals. As the State observed in its petition for a writ of certiorari, the decision of the Second Circuit in this case rests on two fundamentally flawed premises: (1) that so long as the rule of law is clearly established, it is not necessary, for habeas relief to be granted, that the rule of law be clearly established as "Federal law" that is binding on the States, and (2) that 28 U.S.C. § 2254(d)(1) does not require that *this* Court have made the determination that the rule of law at issue is a rule of federal law that is binding on the States. *See* Petition ("Pet.") at 6-7, 15-20. It appears that not a single court of appeals, other than the Second Circuit, has interpreted 28 U.S.C. § 2254(d)(1) in this way.

Second, on the narrower issue of whether, under the holding of *Hill v. United States ex rel. Wampler*, 298

U.S. 460 (1936), a defendant's sentence consists of only those components of the sentence that are explicitly pronounced by the judge at the sentencing proceeding, there is a conflict between the Second Circuit in this case and at least two other courts of appeals. The State has argued that *Wampler* holds no more than that those components of the defendant's sentence that are *discretionary* be pronounced by the sentencing judge; *Wampler* did not hold that those components of the sentence that are mandated by statute, but are not pronounced by the judge, are null and void. *See* Pet. at 27-29. The Second Circuit's holding, that even a mandatory component of a sentence is a nullity, unless explicitly pronounced by the sentencing judge (*see* Appendix ["App."] at 6a-11a, 14a-16a), is contrary to the views of the First and Ninth Circuits, both of which have stated that a sentencing judge need not orally pronounce at the sentencing proceeding those components of a sentence that are mandated by statute. *See United States v. Vega-Ortiz*, 425 F.3d 20, 22-23 (1st Cir. 2005) (defendant who is sentenced to a period of supervised release is on "constructive notice" of those conditions of supervised release that are mandated by statute, regardless of whether judge specifies those conditions in pronouncing sentence); *United States v. Napier*, 463 F.3d 1040, 1042-43 (9th Cir. 2006) (sentence of supervised release implicitly includes mandatory and standard conditions of supervised release, regardless of whether these conditions are orally stated at sentencing proceeding; however, non-standard conditions of supervised release must be pronounced by the sentencing judge).

Thus, although the issues presented by this case would warrant review by this Court even were there no conflict among the circuits, in fact there are conflicts between the Second Circuit's positions and the positions of other courts of appeals. In any event, even if there were no

conflict between the Second Circuit and other courts of appeals, that circumstance would not weigh against the reasons for this Court to grant certiorari, vacate the decision of the Second Circuit, and remand the case to that court for further consideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006). *See* Pet. at 24-29.

2. The defendant also maintains that since the issuance of the Second Circuit's decision in this case, the courts of New York State have followed that decision, and have "interpreted the *Wampler* rule as binding, repeatedly citing that case in holding that where a judge does not announce PRS, the defendant does not have it" (Br. Opp. at 12). Presumably, the defendant's point is that because the New York courts have concluded that the Second Circuit's decision in this case is correct, this Court should be unconcerned about the disruptions the decision has caused.

However, all of the decisions cited by the defendant in support of that proposition (*see* Br. Opp. at 12) are from the Second Judicial Department of New York's intermediate appellate court, the Appellate Division. The defendant fails to note that the First Judicial Department has not followed *Earley*, and, indeed, has repeatedly rejected the claim that if a defendant was not informed at sentencing of the mandatory term of post-release supervision that is included in his sentence (*see* N.Y. Penal Law §§ 70.00[6], 70.45[1]), then the term of post-release supervision is not part of his sentence. *See People v. Thomas*, 35 A.D.3d 192, 826 N.Y.S.2d 36 (App. Div. 1st Dep't 2006); *People v. Lingle*, 34 A.D.3d 287, 289-90, 825 N.Y.S.2d 12, 14-15 (App. Div. 1st Dep't 2006); *People v. Sparber*, 34 A.D.3d 265, 823 N.Y.S.2d 405 (App. Div. 1st Dep't 2006); *see also People v. Hill*, 39 A.D.3d 1, 830 N.Y.S.2d 33, 40 n.7 (App. Div. 1st Dep't 2007) (expressly refraining from

deciding whether to accept the reading of *Wampler* by the Second Circuit in *Earley*), *leave to appeal granted*, 2007 N.Y. App. Div. LEXIS 2797 (Mar. 13, 2007). The other two judicial departments of the Appellate Division, the Third and the Fourth, have not yet ruled explicitly on the issue, and neither has New York's highest court, the Court of Appeals; but the Third Judicial Department has implicitly rejected *Earley*. *See Garner v. N.Y. State Dep't of Correctional Servs.*, 831 N.Y.S.2d 923 (App. Div. 3d Dep't 2007) (holding that Department of Correctional Services did not impose, but merely enforced, the post-release supervision component of defendant's sentence, which was automatically included by statute; hence Department did not "perform[ ] any judicial function").

Thus, the State has a compelling need for guidance from this Court on whether the *Earley* decision—which is undermining an important provision of New York sentencing law—is correct.[1]

[1] In light of the Second Circuit's decision in this case, judges at sentencing are now routinely pronouncing explicitly the post-release supervision ("PRS") component of the sentence. However, the PRS statute, N.Y. Penal Law § 70.45, was enacted and took effect in 1998 (*see* Act of Aug. 6, 1998, ch. 1, §§ 15, 44, 1998 N.Y. Laws 1, 5-6, 12), and in the period of more than seven and one-half years between the date on which the statute took effect and the *Earley* decision, many defendants were sentenced without being explicitly informed at sentencing of the PRS component of their sentences.

Contrary to the defendant's assertion (Br. Opp. at 5), the fact that, prior to *Earley*, judges at sentencing did not routinely pronounce explicitly the PRS component of the sentence does not suggest either that the judge and the prosecutor in this case were unaware of the PRS statute or that there was a widespread ignorance among judges or prosecutors of the PRS statute. On the contrary, the most likely explanation for the absence of discussion of PRS at sentencing was that sentencing judges and prosecutors thought—as New York appellate courts did prior to the decision in *Earley*—that this mandatory component of the sentence, which was included by operation of law as a

3. The defendant disagrees with the State's characterization of the holding of *Wampler* (*see* Pet. at 27). According to the defendant, the Second Circuit correctly identified as the holding of *Wampler* the language in that case to the effect that the only cognizable sentence is the one imposed by the judge and that any component of the sentence not pronounced by the judge is a nullity. *See* Br. Opp. at 7-10.

However, contrary to the defendant's claim, it must be significant to the holding of *Wampler* that, under the law at the time of that case, a federal court could, but did not have to, impose a sentence of imprisonment as a means of effectuating the payment of a fine. Were that provision of the law of no importance to the outcome of *Wampler*, then Justice Cardozo presumably would not have cited the relevant federal statute and various cases interpreting it, and would not have declared that "[t]he choice of pains and penalties, *when choice is committed to the discretion of the court*, is part of the judicial function. This being so, it must have expression in the sentence . . . ." *Wampler*, 298 U.S. at 463-64 (emphasis added).

In any event, as previously argued (*see* Pet. at 27-29), this Court's decision in *Carey v. Musladin*, 127 S. Ct. 649 (2006), teaches that, when reviewing a state court's decision under 28 U.S.C. § 2254(d)(1), the federal habeas court should construe the holdings of this Court narrowly. Otherwise, the intent of the AEDPA, that state courts not be penalized for failing to follow rules that did not clearly govern their criminal proceedings (*see* Pet. at 17-18), would be thwarted. Thus, even if it would not be incorrect for a federal court to follow the

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part of the sentence, did not need to be stated explicitly on the record at sentencing. *See Deal v. Goord*, 8 A.D.3d 769, 778 N.Y.S.2d 319 (App. Div. 2004); *People v. Crump*, 302 A.D.2d 901, 753 N.Y.S.2d 793 (App. Div. 2003).

"broader holding" (App. at 7a) of a Supreme Court decision when adjudicating the case of a federal prisoner, the federal court must hew to the core holding of the decision when adjudicating the habeas petition of a state prisoner.

4. The defendant also takes issue with the State's assertion that the statutory phrase, "clearly established Federal law, as determined by the Supreme Court of the United States," means (1) that the constitutional (or other federal) character of the rule of law must be clearly established, and (2) that this Court must be the court to announce the constitutional (or other federal) character of the rule of law (*see* Pet. at 6-7, 15-20; Br. Opp. at 11-12). The defendant contends that the State's interpretation of 28 U.S.C. § 2254(d)(1) "stretches AEDPA beyond the breaking point," and that it was not illegitimate for the Second Circuit to "reasonably infer[] that *Wampler* was grounded in the due process clause" (Br. Opp. at 11, 12).

However, the State's interpretation of 28 U.S.C. § 2254(d)(1) not only gives the words of the statute their plain meaning, but also gives effect to the intent of Congress in amending the statute in 1996. *See* Pet. at 16-19. Moreover, even if a lower federal court is empowered under 28 U.S.C. § 2254(d)(1) to determine, in the first instance, that a rule of law announced by this Court is a rule of constitutional law, and even if the inference of the Second Circuit that *Wampler* stands on a constitutional footing is not an unreasonable one, the Second Circuit neglected even to consider whether the constitutional basis of *Wampler* was "clearly established." As previously argued, the alleged constitutional basis of *Wampler* is anything but clear. *See* Pet. at 20-24.

5. The defendant also contends that this in an inappropriate case for a writ of certiorari because, even if the

Second Circuit erred in ruling in his favor on the basis of *Wampler*, he still would be entitled to relief on the basis of *Santobello v. New York*, 404 U.S. 257 (1971). The Second Circuit did not address the defendant's claim that the state courts unreasonably applied *Santobello* in denying his motion to have the post-release supervision component of his sentence excised from his sentence. *See* Br. Opp. at 13-18.

The State disagrees—as did the district court (*see* Pet. at 11-12)—with the defendant's contention that he would be entitled to habeas relief on the basis of *Santobello*.[2] But even if the defendant were correct that he is entitled to habeas relief under *Santobello*, that circumstance would not militate against granting the State's petition for certiorari. As the State has argued, this case presents substantial issues that warrant this Court's review (*see* Pet. at 15-29), and the decision of the Second Circuit, if it is not corrected, may invalidate the post-release supervision component of countless New York criminal sentences. Moreover, the fact that the Second Circuit did not resolve the *Santobello* issue is no obstacle to this Court's review of the case. If this Court grants certiorari and rules in the State's favor on the issues presented in the petition, or if this Court grants certiorari, vacates the Second Circuit's decision, and remands for further consideration in light of *Musladin*, then upon remand to the Second Circuit, that court could rule on the *Santobello*

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[2] Notably, the defendant did not cite or rely on *Wampler* in his briefs to the Second Circuit. Following briefing and oral argument of the case, the Second Circuit directed the parties to submit additional briefs addressing whether the state courts had made a decision contrary to federal law in ruling that the defendant's sentence included a term of post-release supervision, when neither the oral nor the written judgment referred to the term of post-release supervision. This circumstance suggests that the Second Circuit was not inclined to rule in the defendant's favor on his *Santobello*-based claim.

issue. Thus, even if the defendant ultimately were entitled to habeas relief under *Santobello*, the State has a compelling interest in this Court's review of the decision of the Second Circuit.

Accordingly, at the very least, this Court should grant the petition, vacate the judgment of the Second Circuit, and remand the case to that court for further consideration in light of *Carey v. Musladin*, 127 S. Ct. 649 (2006).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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